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Shelley Williams, Regional TMDL Coordinator
Virginia Department of Environmental Quality
Southwest Regional Office
355 Deadmore Street
Abingdon, Virginia 24212-1688

VIA Email: sdwilliams@deq.virginia.gov
RE: Comments on North Fork and South Fork Pound River TMDLs for Benthic Impairments, Wise County, Virginia

Dear Ms. Williams:

Please accept these comments on behalf of the Southern Appalachian Mountain Stewards (SAMS) and the Sierra Club on the Draft TMDL for the North Fork and South Fork Pound River (TMDL). SAMS, a Virginia non-stock membership corporation based in Appalachia, Virginia, is an organization of concerned community members and their allies who are working to stop the destruction of Appalachian communities by surface coal mining, to improve the quality of life in the region, and to help rebuild sustainable communities. The Sierra Club is a national nonprofit corporation with more than 1.3 million members and supporters nationwide and more than 17,000 members who reside in Virginia and belong to its Virginia Chapter. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass the exploration, enjoyment and protection of mountains, forests and streams in Virginia.

These comments focus on the South Fork of the Pound River and Phillips Creek. We want to take this opportunity to thank the Virginia Department of Environmental Quality (DEQ) and the Virginia Tech Department of Biological Systems Engineering for the considerable effort that went into preparing this draft. We recognize that TMDLs for stream impairments caused by mining engender a particular set of regulatory challenges that complicate the development of attainable load allocations for watersheds. Additionally, remediation planning is especially difficult when a watershed is as severely impaired as South Fork and Phillips Creek. This latest draft of the Pound River TMDL is a significant step forward in DEQ's efforts to develop a systematic plan for cleaning up southwest Virginia's coalfield watersheds. In particular, the dramatic reductions in pollution from active mining recommended by this TMDL represent a hopeful first step in addressing this very serious problem.

However, the TMDL's recognition of the problem only gets part way to meeting the requirements of the Clean Water Act. This TMDL fails to provide a reasonable assurance that the waste load allocations (WLA) and load allocations (LA) prescribed will achieve water quality standards in these streams.

With regard to sediment pollution, while the TMDL recommends dramatic reductions in its allocation scenarios, there is nothing in the draft to even suggest a change from the status quo. Perhaps the most significant problem with this TMDL is that the bulk of the sediment pollution load for active mining is assigned as a LA rather than a WLA. This assignment is in error. Active mines are point sources of pollution. The Clean Water Act requires that all pollution originating from point sources be allocated as WLA not LA. The draft's error in not so allocating allows active mines in the watershed to maintain their current VPDES limits.

Having allocated sediment pollution as a LA, the TMDL recommends only best management practices (BMPs) for the watershed's active mines to meet the drastically reduced LAs. Since BMPs for erosion and sediment control for active mines are already required by Virginia law, the status quo will be maintained. Even if it were proper, therefore, to assign the bulk of pollution from active mining to LAs, this TMDL could not provide a reasonable assurance that the stormwater pollution reductions would be sufficient to make up for the TMDL's failure to recommend any ratcheting down of the VPDES sources in this watershed.

With regard to total dissolved solids (TDS), this TMDL invokes the state's agreement

with the industry to not regulate this pollutant at this time. Virginia's unwillingness to regulate this known pollutant is in violation of its Clean Water Act duties.

For these reasons, this draft cannot and does not provide a reasonable assurance that the LAs and WLAs given are sufficient to achieve water quality standards. Because the TMDL fails to design an allocation scenario that would force clean up of the pollution coming from these mines through more stringent permit requirements, we ask that DEQ reconsider this TMDL and develop allocation scenarios with concrete WLAs for active mining that would be immediately actionable to all current active mines in the watershed.[1]

Sediment Pollution

Stormwater Discharges from Active Mines Must Be Allocated as WLA

The TMDL characterizes the bulk of sediment coming from active mines as "uncontrolled" and thereby assigns this pollution as LA rather than WLA. This assignment is incorrect. Stormwater discharges from active mines are not uncontrolled pollution sources. Coal mines are designed such that all stormwater runoff passes through the mine's sediment ponds and out one of its NPDES permits. Stormwater runoff is therefore controlled at these point-source permit points. Because active mines are controlled by point-source VPDES permits, all pollution originating from these sites must be given WLAs and not LAs. 40 C.F.R. §130.2(h). The fact that the TMDL finds that the active mines are discharging sediment well in excess of the 70 mg/l provided for in 40 C.F.R. Part 434 does not make that pollution non-point source pollution.

Only by assigning a WLA for all permitted sources in these streams can the TMDL provide any assurance that Virginia water quality standards will be met. The wide discrepancy between the amount of pollution permitted by current permits and the amount modeled to be coming from these active mines indicates that the current permitting requirements are grossly insufficient. Only by including stormwater in the WLA, as the regulations require, can this TMDL begin to force the types of actions necessary to curb the pollution from these mines and ensure clean up of these streams.

[1] Further, it should be noted that because of the severity of pollution in this watershed, a TMDL could only allow for future growth if it ensured that current pollution levels would be significantly curtailed such that new pollution sources would not cause or contribute to violations of Virginia's water quality standards. This TMDL is insufficient

BMPs Are Insufficient to Reduce Stormwater Pollution

Even if the TMDL's LA for stormwater coming from active mine sites were proper, its recommendation of BMPs to reduce that pollution cannot provide reasonable assurance that such nonpoint source reductions would occur as is required by EPA. The primary reason for the lack of any assurance that these reductions can or would occur is the TMDL's erroneous assumption that erosion and sediment controls are not in place for these active mining sites.

The TMDL explicitly states that the WLAs were developed "assuming the absence of erosion and sediment control BMPs on site." Based that assumption, the TMDL "presumes" that installation of BMPs in compliance with an approved SWPP plan would be sufficient to allow the mining operations to meet their assigned allocations.[2] TMDL, Table 7.2. These assumptions are unsupportable.

The assumption that sediment and erosion control BMPs are not currently used by active coal mines is contrary to Virginia law. The regulations governing these mining operations explicitly require that "[a]ll mining operations shall have adequate drainage, erosion, and sediment control measures…." 4 VAC 25-31-440. The specific BMPs that must be installed and maintained to ensure adequate erosion and sediment controls are found in the state's Coal Surface Mining Drainage Handbook. 4 VAC 25-140-830. In addition to those requirements, Virginia's regulations require that "[a]ll permanent streams shall be protected from spoil by natural or constructed barriers as determined by the Division." 4 VAC 25-140-880. The TMDL's assumption should therefore be that the required BMPs are currently being used at these mining operations and do not sufficiently control sediment runoff on these sites. Only with this more accurate assumption can the TMDL begin to determine what additional permitting controls are necessary to provide a reasonable assurance that the allocations in this TMDL can be met.[3]

The gravity of this error of assumption is clear when one examines the percent reductions

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to provide such assurances. Therefore, under the current draft, the Clean Water Act would bar any new mining permits in this watershed.

[2] The TMDL states that compliance with SWPP "is presumed to meet the assigned WLAs." (TMDL, Table 7.2 subscript.) Since the WLAs are based on regulatory requirements that are in place and no reductions or changes are recommended, I presume that the above statement should read "…is presumed to meet the assigned LAs."

[3] The contrary assumption, as stated in the TMDL, is that the Virginia's coal surface mining law and regulations are not being followed. If this is the conclusion of the TMDL, it needs to be stated explicitly and supported, so

required from "uncontrolled" stormwater on active mine sites. The chosen alternatives for both Phillips Creek and South Fork require 94.7% and 64.2% reductions in uncontrolled stormwater, respectively. (Tables 7.5 and 7.6). To meet these dramatic reductions, the TMDL suggests only that "[i]mproved erosion control management and minimization of disturbed area footprints should be the primary targets of implementation efforts." (TMDL, Section 7.1.5). The TMDL does not mention what erosion control improvements could effectively attain the 94.7% and 64.2% reductions required.

TDS

As with the sediment allocations, the TDS TMDL recognizes that TDS pollution in Phillips Creek and South Fork is caused primarily by active mining. (TMDL, Table 7.8). Also like the sediment TMDL, the allocation scenario recommends dramatic reduction percentages for active mining. It appears from the reduction scenarios described in Section 7.4 and Table 7.10, that the recommended TDS reductions will be sequential. Under the recommended sequence, no reductions will be required from active mining until all AML TDS pollution is eliminated. The TMDL does not consider or explain how this will be achieved. It is unclear, in particular, if the state will be required to use its AML funding to reduce all TDS loading from AML sites before any reductions are required from active mines. If that is not the case, it is equally unclear how remining could be used to eliminate the TDS pollution. Remining would require a new permit. No new coal mining permits can be granted in this watershed because such permits would cause further violations of Virginia's water quality standards. Therefore, the sequential approach outlined in the TMDL fails to satisfy EPA's reasonable assurance requirement.

Cooperative Solution

The current draft of the TMDL contains language that appears to reflect the state's agreement that it will not regulate the coal industry for known TDS pollution from active mines unless and until a TDS water quality standard is developed and the TMDLs that list TDS as a stressor are reopened. (TMDL, Section 7.5.1). Virginia lacks the authority to abdicate its duty to enforce the Clean Water Act in this way. Ongoing discharges of TDS pollution at levels that contribute to the violations of the aquatic life use standard in these streams are in violation of the

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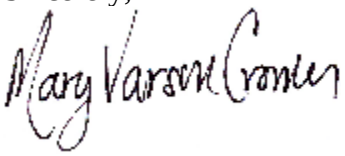
Virginia's public officials and citizens can use the data and conclusions of this TMDL to remedy the implementation and enforcement problems that have been uncovered.

Clean Water Act. Virginia must immediately take the necessary steps to remediate known TDS pollution problems in this and other coalfield watersheds.

Conclusion

Thank you for the opportunity to comment on this draft of the Pound River TMDL. We hope to have the opportunity to continue working with you on this and other coalfield TMDLs. We believe that these studies are crucial to ensuring effective clean up of Virginia's coalfield watersheds.

Sincerely,



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